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Nasruddin bin Daud v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–26 OF 2007
HELILIAH, SULAIMAN DAUD JJCA AND T SELVENTHIRANATHAN J
17 NOVEMBER 2009

C

Criminal Law — Dangerous Drugs Act — s 37(da) — Trafficking in 11,544.7g of cannabis — Whether presumption under s 37(d) rebutted by accused

D

Criminal Law — Dangerous Drugs Act — s 39B(1)(a) — Trafficking in 11,544.7g of cannabis — Dangerous drugs found in bag slung over appellant's shoulder — Whether possession of large quantity negated possibility that drugs were for self consumption — Whether prima facie evidence of trafficking established — Whether inferential mens rea attained under statutory presumption — Dangerous Drugs Act 1952 ss 2, 37(da) & 39B(1)(a)

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On 19 April 2000, acting on information received, SP3 led a six member police team to the vicinity of Masjid Amaniah, Batu Caves, Selangor. A surveillance and observation was made. SP3 then saw the appellant crossing the road heading towards the mosque with a big bag slung over his right shoulder. Upon sensing the presence of SP3, the appellant dropped the bag and started to run. SP3 chased the appellant and managed to apprehend him. The appellant was then led to the spot where the bag fell. The zip of the bag was already damaged such that the contents of the bag were visible. Inside the bag was a large cardboard box containing several large lumps wrapped in a chocolate coloured plastic and a sheet of newspaper. The appellant was later charged and convicted for trafficking in 11,544.7g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The learned trial judge in determining that s 37(d) of the DDA was applicable had made a finding of fact that the accused was carrying the bag on his shoulder from across the road to enter into the mosque compound and had therefore satisfied the elements requisite to the application of statutory presu mption under s 37(d). The appellant appealed against the decision. It was the appellant's contention that it was erroneous to use the act of carrying large quantities to come to a conclusion that the appellant fell within the definition of trafficking under s 2 of the DDA. According to the appellant, such act of carrying could not be used the second time to show knowledge or mens rea under s 2 of the DDA for trafficking. It was also claimed that the learned trial

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judge had failed to address his mind to the case for the defence on account of having rejected the defence in toto.

Held, dismissing the appeal:

(1) From the time of observation the appellant was seen alone carrying the bag slung over his shoulder. The zip of the bag when subsequently examined was found to be damaged. The cardboard box inside it was not covered. It was opened at the top and thus visible to sight. The accused was seen crossing the road. In the circumstances, the judge had not erred in making a finding that it was most certainly prima facie evidence of trafficking under s 2 of the DDA and in the context of s 39B. The inferential mens rea is attained under the statutory presumption if and when the requisites are satisfied (see paras 16–17).

(2) The trial judge specifically expressed that the accused had not discharged the burden to rebut, on a balance of probabilities, the presumptions invoked under s 37(d) of the DDA. This evidenced that he had exercised his discretion in considering the evidence of the defence and prosecution. He had reflected his awareness of the two versions (see para 20).

(3) In the light of the evidence, the version of the accused was riddled with ambiguity. If it was true that the appellant was in the precincts of the compound for the purpose of prayers, it was not consistent with the behavior of running away as SP3 was attired in civilian clothes. His conduct in taking flight upon seeing SP3 behind him raised a questionable inference (see paras 22 & 26).

(4) The trial judge had properly considered the matter that the possession of such large quantities could negate the possibility that the drugs were in his possession for his own consumption or even to suggest that he was in its possession as a drug addict (see para 29).

(5) The appellant had failed on the balance of probabilities to rebut the presumption invoked under s 37(d) of the DDA and hence the prosecution had established its case beyond reasonable doubt (see para 30).

[Bahasa Malaysia summary

Pada 19 April 2000, bertindak atas maklumat yang diterima, SP3 membawa sepasukan enam orang polis ke sekitar Masjid Amaniah, Batu Caves, Selangor. Satu pengawasan dan pemerhatian telah dibuat. SP3 melihat perayu melintas jalan menghala masjid dengan satu beg besar pada bahu kanannya. Apabila mengetahui kehadiran SP3, perayu menjatuhkan beg dan berlari. SP3 mengejar perayu dan berjaya menangkapnya. Perayu kemudian dibawa ke tempat di mana beg tersebut jatuh. Zip beg tersebut rosak sehingga

A kandungan beg itu dapat dilihat. Di dalam beg tersebut terdapat kotak kadbod besar yang mengandungi beberapa bungkusan besar yang dibungkus dengan plastik berwarna coklat dan sehelai suratkhabar. Perayu didakwa dan disabitkan bagi kesalahan mengedar 11,544.7g ganja di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Hakim perbicaraan yang bijaksana
B dalam menentukan bahawa s 37(d) ADB adalah terpakai telah membuat satu penemuan fakta bahawa tertuduh membawa beg pada bahunya dari seberang jalan untuk memasuki perkarangan masjid dan oleh itu telah memenuhi elemen-elemen yang diperlukan untuk penggunaan anggapan berkanun di bawah s 37(d). Perayu merayu terhadap keputusan itu. Adalah menjadi
C penghujahan perayu bahawa adalah salah untuk menggunakan suatu perbuatan iaitu membawa kuantiti yang besar dalam membuat keputusan bahawa perayu terangkum dalam takrifan pengedaran di bawah s 2 ADB. Menurut perayu, perbuatan pembawaan beg tidak boleh digunakan untuk kali kedua bagi menunjukkan pengetahuan atau mens rea di bawah s 2 ADB
D untuk pengedaran. Ia juga didakwa bahawa hakim perbicaraan terpelajar telah gagal untuk mempertimbangkan kes pembelaan kerana telah menolak pembelaan tersebut secara keseluruhannya.

Diputuskan, menolak rayuan:

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(1) Bermula dari masa pemerhatian perayu dilihat berseorangan membawa beg di bahunya. Zip beg apabila diperiksa telah didapati rosak. Kotak kadbod di dalamnya tidak ditutup. Ia telah dibuka di bahagian atas dan oleh itu kandungannya dapat dilihat. Tertuduh dilihat melintas jalan.
F Dalam keadaan ini, hakim tidak terkhilaf dalam membuat keputusan bahawa ia adalah bukti prima facie bagi pengedaran di bawah s 2 ADB dan di dalam konteks s 39B. Mens rea berdasarkan inferens dicapai di bawah anggapan berkanun jika dan apabila syarat-syaratnya dipenuhi (lihat perenggan 16–17).

G (2) Hakim perbicaraan khususnya menyatakan bahawa tertuduh tidak berjaya menyangkal, atas imbangan kebarangkalian, anggapan-anggapan di bawah s 37(d) ADB. Ini membuktikan yang beliau telah menggunakan budi bicaranya dalam mempertimbangkan bukti-bukti pembelaan dan pendakwaan. Beliau telah menggambarkan
H kesedarannya terhadap kedua-dua versi (lihat perenggan 20).

(3) Berdasarkan bukti, versi tertuduh mengandungi banyak ketaksaan. Jika benar bahawa perayu berada di kawasan perkarangan untuk tujuan sembahyang, ia tidak konsisten dengan tingkah laku melarikan diri
I kerana SP3 berpakaian sebagai orang awam. Kelakuannya melarikan diri apabila melihat SP3 di belakangnya menimbulkan satu kesimpulan yang dipersoalkan (lihat perenggan 22 & 26).

(4) Hakim perbicaraan telah mempertimbangkan dengan betul perkara bahawa milikan kuantiti sebesar itu boleh menafikan kemungkinan bahawa dadah dalam milikan perayu adalah untuk penggunaan dirinya sendiri atau malahan untuk mencadangkan dia memiliki dadah sebagai seorang penagih dadah (lihat perenggan 29).

(5) Perayu gagal menyangkal anggapan-anggapan di bawah s 37(d) ADB atas imbangan kebarangkalian dan oleh itu pihak pendakwaan berjaya membuktikan bahawa kes tersebut melampaui keraguan munasabah (lihat perenggan 30).]

Notes

For cases on s 37(da) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 220–230.

For cases on s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 320–449.

Cases referred to

Dato' Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)
Ramis a/l Muniandy v PP [2001] 3 SLR 534, CA (refd)
Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (refd)
Zulfikar bin Mustaffah v PP [2001] 1 SLR 633, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), 39A(2), 39B, 39B(1)(a)

Appeal from: Criminal Trial No 45–14 of 2001 (High Court, Shah Alam)

Rosli bin Zain (Rosli Zain & Associates) for the appellant.
Tengku Amir Zaki bin Tengku Abdul Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Heliliah JCA (delivering judgment of the court):

[1] The appellant was convicted for drug trafficking pursuant to a charge preferred under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA 1952'). We have dismissed the appeal. The conviction and the mandatory death sentence imposed by the High Court have been affirmed. Our reasons are set forth hereinafter.

A **[2]** The charge reads:

> Bahawa kamu pada 19hb April, 2000 jam lebih kurang 9.15 malam di Kawasan Masjid Amaniah Jalan Batu Caves, Selayang, di dalam daerah Gombak dalam Negeri Selangor Darul Ehsan telah mengedar dadah berbahaya iaitu seberat **B** 11,544.7 gram Cannabis dan oleh yang demikian kamu telah melakukan suatu kesalahan dibawah Seksyen 39B (1) (a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B (2) Akta yang sama.

C **[3]** Learned counsel for the appellant (the accused) has directed his submission towards findings of fact deduced by the learned trial judge and the issues of law arising from the findings of fact.

[4] The prosecution's case was appraised primarily on the evidence led by DSP Giam Kar Hoon ('SP3'). On 19 April 2000, acting on information of **D** SP3 at about 7pm led a six member police team to the vicinity of Masjid Amaniah, Batu Caves, Selangor. According to the information received there was to be anticipated some form of delivery of drugs. A surveillance and observation was made by SP3 of the main entrance to the mosque while he remained seated in an unmarked police car. Another team was stationed in **E** front of certain shops located opposite the mosque. Another two police personnel using a motorcycle were posted to observe the back entrance of the mosque. The observation commenced at about 7pm and all members of the team were attired in civilian clothes.

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[5] At approximately 9.15pm, SP3 saw a male crossing the road from the direction of a row of shops located across the road heading towards the mosque. The male was seen carrying, that is, slung over his right shoulder what was described as a big bag. SP3 alerted the other police personnel **G** through walkie-talkie.

[6] SP3 then alighted from the police car after having instructed one D/Sgt M Abdullah who was then accompanying to follow him in the car after a few seconds. While tailing the suspect, SP3 approached him to get closer. **H** However, on account of the headlights of the motorcar being beamed on him, the suspect looked behind and upon sensing the presence of SP3, he dropped the bag and started to run. Thereupon SP3 shouted 'Berhenti, Polis' and gave chase. SP3 managed to topple the suspect and with the assistance of the other police personnel succeeded in apprehending the suspect. The **I** suspect was apprehended at a spot which was about 40–50 ft away from where the bag that he was seen holding fell.

[7] The suspect was then led to the spot where the bag fell. Upon physical search being made on his person SP3 retrieved an Indonesian passport

bearing the name Nasruddin (the appellant), a wallet containing cash for the amount of RM850 and a piece of US dollar and a bunch of keys.

[8] The bag is described as a big plastic bag with red, yellow and green stripes with a handle. The zip of the bag was already damaged and such that the contents of the bag were visible to sight. SP3 could see upon examining the bag a large cardboard box was placed inside the bag. The top portion of the cardboard box was not covered and he could see that it contained several large lumps wrapped in a chocolate coloured plastic and a sheet of newspaper. When SP3 examined further the contents of the cardboard box in the presence of the appellant, four large lumps also wrapped in yellowish chocolate coloured plastic and ten large lumps wrapped in clear plastic together with a newspaper were found.

[9] The 14 large lumps recovered from the cardboard box were analysed to be cannabis by the chemist, SP2 and weighed 11,544.7g.

[10] In the appeal before us, learned counsel for the appellant has taken issue on a specific aspect of the written grounds of the trial judge when he stated, inter alia, as follows:

> The accused was called upon to enter his defence at the close of the prosecution's case as exh P15 (the large plastic bag) and P16 (the large cardboard box, containing the 14 large lumps) were in the custody and control of the accused when he carried the bag on his shoulder from across the road into the mosque compound. In the circumstances, s 37(d) of the DDA was applicable, and further, the overt act of the accused carrying the large plastic bag on his shoulder, and walking across the road into the compound of the mosque opposite, is not passive possession but mens rea possession of the drugs. To be in possession of such a large quantity of drugs, and simultaneously to be carrying same on the shoulder from across the road into the precinct of the mosque, is most certainly prima facie evidence of 'trafficking' within the definition of 'trafficking' under s 2 of the DDA and the context of s 39B.

[11] Counsel for the appellant contends that the act of carrying the bag has led the trial judge to invoke the presumption under s 37(d) of the DDA 1952 and it is urged that it would be erroneous to use the same act of carrying large quantities to assist the court in coming to a conclusion that because he was in possession of such a large quantity of drugs it would therefore fall within the definition of trafficking under s 2 of the DDA 1952. The possession here is described by counsel to be presumed possession and not that of being found in possession. The submission is that the defence should be called only for possession under s 39A(2) of the DDA 1952 and not for trafficking because of the presumed possession which was invoked by virtue of the fact that the appellant was carrying the drugs when arrested and as such the act

of carrying cannot be used the second time against the appellant to show knowledge or mens rea under s 2 of the DDA 1952 for trafficking.

[12] The submission of counsel for the defence leads us necessarily to the judicial statements in *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337 where, inter alia, Ariffin Zakaria FCJ (at p 349) reminded:

> It is trite that what constitutes possession under s 37 of the Act is a question of law (see *Yee Ya Mang v Public Prosecutor* [1972] 1 MLJ 120 and *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585). It is however a question of fact whether in a given case a person can be said to be in possession of something.

[13] His Lordship then considered the decision in the Singapore Court of Appeal in *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633; *Ramis a/l Muniandy v Public Prosecutor* [2001] 3 SLR 534 and the oft cited *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356. The most relevant passage cited by His Lordship is the observation of the Singapore Court of Appeal in *Zulfikar*'s case:

> In this regard it is pertinent to refer to the observation of the Singapore Court of Appeal in *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633 at p 639:
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> > 21 For the element of 'possession' (within the meaning of s 17 of the Misuse of Drugs Act) to be established, it must not only be shown that the accused had physical control of the drugs at the relevant time; the prosecution must also prove that the accused possessed the requisite knowledge as to the contents of what he was carrying: see *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256; *Tan Ah Tee & Anor v Public Prosecutor* [1978–1979] 1 SLR 211; [1980] 1 MLJ 49. In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.
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> > 22 We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. *Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible*. As Yong Pung How CJ remarked in *Public Prosecutor v Hla Win* [1995] 2 SLR 424 at p 438:
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> > > In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses. (Emphasis added.)

[14] It is also incumbent here to refer to *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717 in which the Federal Court considered extensively the ratio decidendi in several cases in order to elucidate that mens rea possession or knowledge of the drugs can be proved by drawing inferences from surrounding circumstances. It would be difficult to do so by other means unless there is a forthwith admission by the person himself. Augustine Paul FCJ summarised as follows:

> The law is clear and well settled. Proof of knowledge is very often a matter of inference. The material from which the inference of knowledge be drawn varies from case to case. It would be sufficient for the prosecution to prove facts from which it could be properly inferred that the accused had the necessary knowledge.

[15] The learned trial judge in determining that s 37(d) of the DDA 1952 is applicable has made a finding of fact that the accused while carrying the bag on his shoulder from across the road to enter into the mosque compound has therefore satisfied the elements requisite to the application of a statutory presumption under s 37(d) which provides:

> any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

[16] The physical act of carrying the particular bag containing the drug establishes that the accused is deemed to be in possession of the drug contained in the bag until the contrary is proved. That very same subsection has two limbs. The second limb provides that until the contrary is proved, the accused having had in his custody or control the bag containing the drugs is also deemed to have known the nature of the drug. Hence the trial judge has simultaneously determined that the physical act of the appellant is with knowledge of the drugs.

[17] The submission of counsel for the defence is found to be misconceived having regard to the circumstances of the case as follows:

(a) from the time of observation the appellant was seen alone carrying the bag slung over his shoulder;

(b) the zip of the bag when subsequently examined was found to be damaged; the cardboard box inside it was not covered; it was opened at the top and thus visible to sight; and

(c) the accused was seen crossing the road.

[18] We are unable to accept that in the circumstances described above the judge has erred in making a finding that it is 'most certainly prima facie evidence of 'trafficking' under s 2 of the DDA and the context of s 39B. The inferential mens rea is attained under the statutory presumption if and when the requisites are satisfied.

[19] The second challenge posed in support of the appeal relates to the alleged failure of the learned trial judge to address his mind to the case for the defence on account of having rejected the defence in toto. It was also submitted that the learned trial judge has given undue weight to the evidence of SP3 whilst rejecting the evidence of the accused. Our attention has been drawn to the following passages in the grounds of judgment for consideration:

> At the close of the case for the defence, the court was left with two versions of recovery of the 11,544.7g of the cannabis, the subject matter of the charge. I have considered the evidence of the accused very carefully, in the light of the evidence of the prosecution. Upon the totality of the evidence before me, I reject the accused's evidence that he was driven to the mosque in a van by his employer and, thereafter, he was instructed by the said employer to collect the plastic bag from a person in a Proton Wira parked outside the precinct of the mosque. I also reject the accused's evidence that he then collected and delivered it to the said employer, who placed it inside the van, and from which van the plastic bag and package was recovered by the police. I find, on the evidence before me that the 'taukeh' ('employer') alluded to by the accused is a non-existent person, introduced to create an element of doubt that the accused had any 'mens rea possession' of the drugs. In the circumstances, I rule that the 'taukeh' is a figment of the imagination of the accused and the defence is nothing more than an afterthought.
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> It is totally irrelevant to the finding of the accused's guilt or innocence that the court should determine his mode of transport before he was seen walking and crossing the road carrying on his right shoulder the large plastic bag.
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> After considering the accused's defence, I have no reason to doubt SP3's evidence that the accused had carried the plastic bag from across the road on his shoulder and, thereafter, continued to do so right into the precinct of the mosque (with a view to part with his possession of the drugs, subsequently) but, upon realising that he was being closely pursued by SP3, he immediately dropped the plastic bag, and attempted to flee to avoid arrest.
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> The quantity of cannabis is very large. The accused has not raised a defence that the drug was for his own consumption. In any event, with such a large quantity in his possession, it would be almost impossible for him to convince this court that it was indeed for his own consumption, without an iota of evidence that he is a drug addict.
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> The accused has not discharged the burden to rebut, on a balance of probabilities, the presumptions invoked under s 37(d) of the DDA. Therefore, the prosecution has proved beyond reasonable doubt that the accused was in possession of 11,544.7g of cannabis at the date and time stated in the charge. In the upshot, and

upon taking into consideration the large quantity of the drug involved, the manner it was packaged and carried by accused, coupled with the irresistible inference that he was obviously going to deliver and part with same to same third-party, known or unknown, 'trafficking', within the meaning of s 2 of the DDA and the context of s 39B, has also been proved by the prosecution, beyond reasonable doubt.

[20] It is noted that the trial judge has specifically expressed that the accused 'has not discharged the burden to rebut, on a balance of probabilities, the presumptions invoked under s 37(d) of the DDA'. This evidences that he has exercised his discretion in considering the evidence of the defence and prosecution. He has reflected his awareness of the two versions.

[21] It would appear that in his defence the accused has attempted to introduce the presence or existence of three other unknown persons namely the 'taukeh' who purportedly intends to offer him a job, a driver of a van and another person who is supposedly to have been sitting in a Proton Wira car and from whom the accused alleged he took the plastic bag which was handed over to the 'taukeh'. The version of the accused is that it is the 'taukeh' who placed the plastic bag in the van. The further version of the accused is that both the accused and the 'taukeh' entered the mosque to perform prayers. They were supposedly arrested after emerging from the mosque.

[22] In the light of the evidence, the version of the accused is riddled with ambiguity. In his evidence in chief he claimed to have arrived at the area in the vicinity of the mosque in a white van, the number of which he did not know, and the van was supposed to have been driven by another person whom he did not know.

[23] With regard to the alleged presence of the Proton Wira, in the course of cross-examination of SP3 by defence counsel, SP3 has testified as follows:

Selepas selesai tangkapan dan rampasan di masjid dan semasa nak balik ke Balai Polis Selayang jam lebih kurang 11 lebih malam pada 19 April 2004, OKT telah memberitahu saya dia datang dengan kawan dia menggunakan Proton Wira dan telah tunjuk kepada kereta tersebut yang sedang letak seperti dalam ID12.

[24] Two observations may be made. Firstly, the accused has presented two versions as to how he arrived at the location. Is it the van with the 'taukeh' or the Proton Wira with the friend? Secondly, the evidence of SP3 and SP5 established that the car indicated by the accused subsequently found to bear registration No NAU 3154 is registered in the name of Che Jasmani bin Shariff with an address in Batu Pahat, Johor. The brother-in-law of Jasmani whose name is Azmi bin Harun had rented out the car to one Indonesian by the name of Mohd Azahar. This part of the evidence indicates that the police

had undertaken some investigation in order to ascertain whether there is any connection between the accused and the car that was seized by the police, that is NAU 3154. The name Azahar did not emanate from the accused. Instead in the course of cross-examination it was once put to SP3 as follows:

> Soalan Katakan OKT datang ke tempat itu dengan seorang bernama Osman dengan kereta NAU 3154, Proton?
>
> Jawapan Tidak setuju.

[25] Osman is yet another person alluded to by the defence. In the light of the various other parts of the evidence of the accused which constituted bare denials of the events that transpired leading to his arrest we do not find that there is any error that has been occasioned where the trial judge found that the 'taukeh' is a non-existent person. In other words the defence endeavoured to pull red herrings across the trail.

[26] The trial judge accepted the evidence of SP3, who was not alone, that he had made an observation of the appellant when the latter crossed the road and entered the mosque precincts before he communicated with the other members of the police team present in the area. When SP3 approached the appellant more closely, the appellant turned round, dropped the bag and took to his heels. SP3 has stated that he had borrowed at that time a 'kapiyah' or headgear which is consistently worn by men who intend to perform prayers in the mosque. In that sense if it is true that the appellant was in the precincts of the compound for the purpose of prayers, it is not consistent with the behavior of running away as SP3 was attired in civilian clothes. His conduct in taking flight upon seeing SP3 behind him raises a questionable inference. Even assuming that he was going to the mosque for prayers there was no reason to take to his heels upon seeing SP3. Furthermore, the trial judge has not accepted as credible the version of the appellant that he had emerged from the mosque with the fictitious 'taukeh' before he was arrested.

[27] In addition, with regard to the suggestion that the weight given to the evidence of SP3 has caused some prejudice to the accused, the statements of Abdoolcader FJ (as he then was) in *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 at p 275 should be cited:

> ... The credibility of a witness is primarily a matter for the trial judge. There is a homogeneous concatenation of authority on this principle and we refer to the locus classicus on this aspect in a passage in the judgment of Lord Thankerton in *Watt* or *Thomas v Thomas*. The Privy Council said in *Caldeira v Gray* that the functions of an appellate court, when dealing with a question of fact, and a question of fact in which questions of credibility are involved, are limited in their character and scope, and that in an appeal from a decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, an appellate

court must in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong. We feel that the following passage (at p 138) from the judgment of the board in that case delivered by Lord Alness bears citation in extenso:

> The appellant is exercising a right of appeal which is his by right, and Their Lordships recognise that they cannot merely because the question is one of fact, and because it has been decided in one way by the learned trial judge abdicate their duty to review his decision, and to reverse it, if they deem it to be wrong. Nonetheless, the functions of a Court of Appeal, when dealing with a question of fact, and a question of fact, moreover, in which, as here, questions of credibility are involved, are limited in their character and scope.
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> This is familiar law. It has received many illustrations — and, in particular in the House of Lords — the most recent of these being the case of *Powell v Streatham Manor Nursing Home* [1935] AC 243; LJKB 304; 152 LT 563; 51 TLR 289; 79 Sol Jo 179. In that case it was held that:
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> Where the judge at the trial has come to a conclusion upon the question which of the witnesses, whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to judge of this matter than the appellate tribunal can be: and the appellate tribunal will generally defer to the conclusion which the trial judge has formed.
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> Lord Wright, in the course of his speech, said:
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> > Two principles are beyond controversy. First it is clear, that, in an appeal of this character, that is from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal 'must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong'.

[28] The other aspect to be dwelt upon with regard to the case of the defence is the discussion in *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 at pp 91–92 where the material parts of the statement of Lord Diplock are:

> This appeal turns solely upon the construction of these words 'unless the contrary is proved' ...
>
> The Evidence Ordinance applies to civil and to criminal proceedings alike and the definitions of 'proved' and 'disproved' draw no explicit distinction between facts required to be proved by the prosecution in criminal proceedings and facts required to be proved by a successful party to civil proceedings. Yet it cannot be supposed that the Evidence Ordinance intended by a provision contained in what purports to be a mere definition section to abolish the historic distinction fundamental to the administration of justice under the common law, between the burden which lies upon the prosecution in criminal proceedings to prove the facts which constitute an offence beyond all reasonable doubt and the burden which lies upon a party in a civil suit to prove the facts which constitute his cause of action or defence upon a balance of probabilities.

A The degree of probability of the existence or non-existence of a fact which is required in order for it to be 'proved' or 'disproved' within the meaning ascribed to those words in the Evidence Ordinance, in Their Lordships' view, depends upon the nature of the proceedings and what will be the consequence in those proceedings of a finding that a fact is 'proved' or 'disproved'. If that consequence B will be the determination of a civil suit in favour of one party a balance of probabilities is all that is necessary. It is sufficient that upon the evidence the court considers that it is more likely than not that the fact exists or does not exist. This has been the rule at common law since at least the 16th century. See *Newis v Lark* cited by Willes J in *Cooper v Slade*. In criminal proceedings on the other hand, by an exception to the general rule founded upon considerations of public policy, if C the consequence of a finding that a particular fact is proved will be the conviction of the defendant the degree of probability must be so high as to exclude any reasonable doubt that that fact exists.

D Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which if they existed would constitute the offence with which he is charged are 'not proved'. But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of E which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist 'unless the contrary is proved'. In such a case the consequence of finding that that particular fact is 'disproved' will be an acquittal, whereas the absence of such a finding will have the consequence of a conviction. Where this is the consequence of a fact's being 'disproved' there can be no grounds in public policy for requiring that exceptional degree of certainty as excludes all reasonable doubt F that that fact does not exist. In Their Lordships' opinion the general rule applies in such a case and it is sufficient if the court considers that upon the evidence before it is more likely than not that the fact does not exist. The test is the same as that applied in civil proceedings: the balance of probabilities. This was the test which was approved by the Court of Criminal Appeal in *R v Carr-Briant* a case G upon a provision in an English statute in similar terms to that contained in s 14 of the Malaysian Prevention of Corruption Act 1961. For the reasons already indicated Their Lordships do not think that, at any rate where such a provision is contained in an enactment, the definitions of 'proved' and 'disproved' contained in the Evidence Ordinance make any difference between Malaysian law and English H law in this respect.

[29] In the circumstances of this case the finding of the trial judge is that he has accepted the version of the prosecution and the version attempted to be raised by the accused as not, on a balance of probabilities, being proved to I rebut the presumption being invoked. In addition we do not find the trial judge in error by referring to the large quantities of drugs found in his possession. The trial judge has properly considered the matter that the possession of such large quantities could negate the possibility that the drugs were in his possession for his own purposes or even to suggest that he is

possession of it as a drug addict. It cannot therefore be said that the trial judge did not consider another aspect that could be of some assistance to rebut the presumption.

[30] In its totality we are therefore able to support the conclusion that the appellant has failed on a balance of probabilities to rebut the presumption invoked under s 37(d) of the DDA 1952 and hence the prosecution has established its case beyond reasonable doubt.

Appeal dismissed.

Reported by Kanesh Sundrum